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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

GENE KAPLAN,
Petitioner,
vs.
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS), et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the below court erred in ruling the Eleventh Amendment bars an ADEA action by a State employee even when the State twice issued explicit written waivers for Plaintiff to sue in Federal Court as required by *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985).

2. Whether the below court erred and was in conflict with *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273, 284 (1906) in ruling the Eleventh Amendment bars a State employee's ADEA action when immunity argument was previously made and withdrawn by State which then submitted to the authority and jurisdiction of the federal court's order to conform its conduct to a State law. Also, Defendants failed to appeal the District Court's ruling there was no State immunity and only later reintroduced immunity argument as to ADEA claims.

3. Whether the below court erred by not ruling California Government Code §21417 violates the equal protection clause of the Fourteenth Amendment by giving those disabled by favored causes or those younger when hired higher pensions than similarly circumstanced disabled peace officers such as plaintiff whose cause of injury was unfavored and who was over 40 at hire.

4. Whether the below court erred in ruling there was no violation of the due process clause of the Fourteenth Amendment when Defendants medically retired civil service peace officer plaintiff and slashed his pension entitlement by 46 percent without notice as to reasons why, explanation of evidence, pre-retirement appeal, or post-retirement hearing.

5. Whether the below court erred and was in conflict with *Felder v. Casey*, 487 U.S. 131, 147 (1988) and *Cary v. Piphus*, 435 U.S. 247, 262-263 (1978) in dismissing Claims

for violation of due process clause of the Fourteenth Amendment on slashed pension when it did so ordering Defendants to give a hearing and said Plaintiff could later proceed to State Superior Court for redress if he disagreed with the outcome, thereby requiring exhaustion of State remedies prior to a §1983 claim.

6. Whether the below court erred and was in conflict with *Zinerman v. Burch*, 494 U.S. 113, 124-126, and Footnote 11 at 126 (1990) rule there is §1983 remedy when State remedy adequate in theory is withheld in practice when below court found no due process clause of the Fourteenth Amendment violation even though Defendants medically retired peace officer plaintiff, slashed his pension entitlement by 46 percent, and made stigmatizing statements implicating his liberty interest without the pre-retirement notice and hearings required by State law and regulations.

7. Whether the below Court erred and was in conflict with *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) rule that if government "attaches a badge of infamy" due process comes into play when the below court found no due process clause of the Fourteenth Amendment violation for "clinically depressed" allegation by ruling "only" charges that carry the stigma of moral turpitude such as dishonesty or immorality implicate liberty interests and entitle plaintiff to due process.

8. Whether the below Court erred and was in conflict with *Gomez v. Toledo*, 446 U.S. 635, 639-641 (1980) and *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998), when below court ruled evidence of subjective motive was required and dismissed claims that Defendants violated First Amendment rights to protected speech and to petition for redress by stigmatizing Plaintiff and slashing his pension, then denying an appeal because he challenged "age bias."

LIST OF PARTIES

1. Petitioner: Gene Kaplan

2. Respondents:

California Public Employees' Retirement System (PERS)

James E. Burton, Chief Executive Officer, in that person's official and individual capacity

Chris Nishioka, Supervisor, PERS Benefit Services Division, in that person's official and individual capacity

Supervisor, PERS Legal Office, in that person's official and individual capacity

PERS Employees J. Doe 1 through 7, in both Does' official capacity and personal capacities

California Board of Administration of PERS

State of California, as Administrator of PERS and as Plaintiff's Employer

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California Government Code §21417 violates the equal protection clause of the Fourteenth Amendment by giving those hired after age 35 disabled by favored causes of injury, and those younger when hired, higher pensions than similarly circumstanced disabled peace officers who were over 35 at hire and were disabled by unfavored causes of injury.

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Amendment as when Defendants medically retired plaintiff, slashed his pension by 46 percent, and made stigmatizing statements implicating his liberty interest without the pre-retirement notice and hearings required by State law and regulations, *Zinerman v. Burch*, 494 U.S. 113, 124-126, and Footnote 11 at 126 (1990).

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The U.S. Supreme Court ruled in *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) that if government "attaches a badge of infamy" due process comes into play, thus Defendants violated the due process clause of the Fourteenth Amendment with fraudulent "clinically depressed" allegation implicating plaintiff's liberty interest and denying him due process.

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Evidence of subjective motive is not required for claim Defendants violated First Amendment rights to protected speech and to petition for redress by stigmatizing Plaintiff for protected activity, slashing his pension, then denying an appeal because he challenged "age bias." Needed elements are that Defendants acted under color of law and could be reasonably expected to know they were violating the law, *Gomez v. Toledo*, 446 U.S. 635, 639-641 (1980) and *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998).

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OPINION OR JUDGMENT BELOW

The order of the United States Court of Appeals for the Ninth Circuit, filed May 3, 2000 and the denial of rehearing and en banc hearing dated July 24, 2000 are not reported and are reprinted as Appendix A and B. The Memorandum and Order (filed September 3, 1998) and the Judgment of the United States District Court for the Northern District of California (filed January 28, 1999) are not reported and are reprinted as Appendix C and D.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its order dismissing Gene Kaplan's ADEA claims against Defendants as meritless due to Eleventh Amendment immunity and affirmed the dismissal of all other claims by the United States District Court for the reasons given by the District Court. This court has jurisdiction to review pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE

U.S. Constitution, Amendment 1; U.S. Constitution, Amendment 11; U.S. Constitution, §1, Amendment 14; California Government Code, §3303, §3304(a), §11500, §11501, §11505, §11506; §21132, §21292.5, §21292.6, §21407, §21417, §21430; California Code of Regulations, Title 2, § 555.3. The above are reproduced in the above order in Appendix E.

STATEMENT OF THE CASE

Petitioner, Gene Kaplan, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeal of the Ninth Circuit, affirming dismissal of Gene Kaplan's Complaint to allow this court to determine whether he was deprived of his rights to protected activity guaranteed by the First Amendment, his right to due process and equal protection guaranteed by the due process clause of

§1 of the Fourteenth Amendment, and his right to sue for ADEA violations pursuant to State-issued waivers and abrogation of State immunity by the conduct of Defendants.

Kaplan was a permanent civil service state peace officer investigator who suffered a violence caused injury. His employer requested his retirement and he was disability retired. Pursuant to California Government Code §21417, defendants California Public Employees' Retirement System (PERS), et al. slashed plaintiff's pension 46% to only 27% of final compensation based on his age at hire and denied Kaplan the 50% of final compensation pension due a disabling violent injury and if not that, the at least 37.5% to which he was otherwise entitled by State rules. As a State peace officer Kaplan was a member of PERS. Kaplan learned he was being denied all but 27% and told PERS he wanted his full pension and if not that, 37.5% but never received notice, the required Accusation, pre-action hearing, or timely full trial-type evidentiary hearing to which he had the right. Defendants never provided reasons for all their actions, the materials upon which the decisions were based, or provided an explanation of their evidence. Kaplan was separated from payroll on July 1, 1997.

There was never a response to Kaplan's appeal request on the 37.5% issue, however Defendants later refused Kaplan a 50% appeal because he challenged PERS on grounds including "age bias." After retirement Kaplan learned defendants attributed his medical disability and pension reduction to his petitioning for redress and engaging in off-duty union activity which were alleged to be manifestations of being "clinically depressed" although there was never any such medical finding. Thus defendants denied the 50% pension due for violent injury and damaged Kaplan's community standing and future job prospects. In fact, the State's physician had named the same external cause of injury as had Kaplan, had recommended Kaplan being allowed to petition for redress and engage in off-duty union activity as accommodations to enable Kaplan to return to work, and

found Kaplan could work for the State with accommodations, or another employer without accommodations.

In U.S. District Court for Northern California, Kaplan sued for Age Discrimination in Employment (ADEA); violations of the due process and equal protection clauses of the Fourteenth Amendment; and violation of his First Amendment rights to protected activity. Defendants moved to dismiss, in relevant part pursuant to Federal Rule of Civil Procedure 12(b)(6), Failure to State a Claim, and pursuant to Eleventh Amendment State immunity.

While in District Court, Defendants made an Eleventh Amendment immunity argument. Kaplan said immunity had been waived by PERS. Defendants withdrew their immunity argument after Kaplan so responded. Kaplan also said he held an additional waiver from the State.

District Court Judge Charles R. Breyer issued a court order to Defendants to give Kaplan a hearing on the 27%-37.5% issue pursuant to a State law he selected, then dismissed all of Kaplan's action including the ADEA claims that challenged §21417. Judge Breyer ruled against Defendants' ADEA immunity theory but held the PERS pension formula was not based on hire age citing his previous ruling in dismissing *Arnett v. California PERS*, an earlier challenge to §21417. Judge Breyer ruled Kaplan needed evidence of subjective intent for his First Amendment claims and granted leave to so amend. Kaplan stood on his facts, and the dismissal judgment was entered on the District Court docket February 1, 1999.

Defendants did not appeal the federal court order, or Judge Breyer's ruling against immunity on ADEA claims. Kaplan did appeal to the Ninth Circuit Court of Appeals, and while his appeal was pending, the Ninth Circuit overruled Judge Breyer in *Arnett v. California PERS*, 179 F.3d 690 (9th Cir. 1999) and held that §21417 *was* based on hire age and, unless cost justified, violated the ADEA. Also see *Arnett v. California Public Emp. Retirement Sys.* 207 F.3d 565 (9th Cir. 2000). Kaplan was jubilant, then anticipating

the Ninth Circuit would rule favorably on his ADEA claims since *Arnett* controlled; however, August 11, 1999 and long after Judge Breyer had ruled against their immunity theory, Defendants again alleged they had Eleventh Amendment immunity by asking the Ninth Circuit to dismiss Kaplan's ADEA claims for that reason and did so making no reference to their earlier withdrawal of immunity in District Court, Kaplan's naming of two waivers which remained undisputed on the District Court record, or Judge Breyer's ruling against immunity. Kaplan responded that immunity had been waived citing the two waivers and Defendant's failure to timely appeal Judge Breyer's ruling against immunity. Kaplan also said immunity was abrogated by conduct when Defendant State submitted to Judge Breyer's court order to conform conduct to State law.

May 3, 2000 the Ninth Circuit dismissed Kaplan's ADEA claims as meritless citing Eleventh Amendment state immunity, and adopted the District Court's reasons as to affirming dismissal of the other claims. Kaplan requested rehearing. Kaplan's petition for rehearing was denied July 24, 2000.

JURISDICTION IN COURT OF FIRST INSTANCE

The basis for federal jurisdiction in the court of first instance, the U.S. District Court for Northern California, was:

(a) Pursuant to 28 U.S.C. §§1330 et seq., 1331, and 1343(a)(3), giving federal courts jurisdiction over claims raising violations of constitution for civil rights statutes, this action was authorized and instituted pursuant to the Federal Civil Rights Act, 42 U.S.C. §1983, as amended 1979, and 42 U.S.C. §1988, as amended 1993.

(b) Pursuant to 28 U.S.C. §§451, 1331, 1337, and 1343. This action was authorized and instituted pursuant to Section 626(c)(1)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 et seq. ("ADEA") as amended in 1990 and 1996, which incorporates by

reference sections 16(c) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. §§216(c) and 217.

(c) Pursuant to pendent jurisdiction over causes for action under California state law deriving from a common nucleus of operative fact.

1. THE WAIVERS OF IMMUNITY

One of the two explicit written waivers allowing Kaplan as a retired State employee to sue the State was signed by the California Attorney General's Office in the form of an Agreement which provided:

> "Gene Kaplan ... may pursue his claim in federal court that he is entitled to a retirement based on 50% of his highest salary"

The next explicit written waiver allowing Kaplan to sue the State came when the PERS Counsel said PERS was refusing to provide any appeal as to retirement benefits because Kaplan included allegations of age bias, but Kaplan could proceed to court pursuant to his "right to sue" letter from the U.S. Equal Opportunity Commission. The U.S. EEOC letter provided Kaplan could sue for ADEA violations in Federal court. Kaplan's undisputed facts showed defendant PERS issued consent to Kaplan to go directly to Federal Court to sue for ADEA violations *rather* than provide a hearing on the pension slashing in State channels.

Then in U.S. District Court, Defendants' made an Eleventh Amendment immunity argument. Kaplan answered with the fact PERS had approved proceeding directly to court based on his US EEOC right to sue letter for Federal court. *After* Kaplan responded Defendants said they wanted to "withdraw their Eleventh Amendment immunity argument."

Then Kaplan told Judge Breyer he *also* held an "unequivocal waiver" from the State of California to be in Federal Court. That unchallenged statement also went into the record as Kaplan's undisputed fact. Judge Breyer issued

an order to Defendants to give a 27%-37.5% pension hearing pursuant to a State law he selected, ruled there was no State immunity, then dismissed the ADEA claims on other grounds along with all the rest of Kaplan's case. Kaplan appealed. Defendants did not appeal

On August 11, 1999 Defendants reintroduced the Eleventh Amendment argument before the Ninth Circuit, without mention of Judge Breyer's U.S. District Court ruling against them. Kaplan replied immunity was waived by the Agreement signed by the California Attorney General's Office, the waiver by PERS, and by Defendants when they failed to timely appeal Judge Breyer's ruling since Kaplan's undisputed waivers were on the District Court record thus when Judge Breyer ruled he had before him mixed questions of law and fact, and that immunity had been abrogated by the State when it withdrew its immunity argument and submitted to the District Court's federal court order to conform their conduct to a State law and thus submitted to federal jurisdiction to gain advantage on the 37.5% due process claim.

The Ninth Circuit ruled Kaplan's ADEA claims were meritless due to Eleventh Amendment immunity May 3, 2000, and denied Kaplan's petition for rehearing July 24, 2000.

The Ninth Circuit erred by interpreting the Eleventh Amendment to bar all ADEA actions by state employees and did so in conflict with the U.S. Supreme Court's teaching that a state can waive immunity because in this case immunity was waived. "The State can waive the [Eleventh Amendment] defense," *Wisconsin Dept. of Corrections v. Schact,* 118 S. Ct. 2047, 2052 (1998). "If a state waives its immunity and consents to suit in Federal Court, the Eleventh Amendment does not bar the action." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985); *Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 473 (1987).

2. IMMUNITY ABROGATED BY CONDUCT

Defendants made an immunity argument in District Court, then attempted to withdraw it. Judge Breyer ruled there was no State immunity on ADEA claims, but still dismissed all Kaplan's claims; however, dismissal was expressly conditioned on Defendants' submission to Judge Breyer's federal court order to give Kaplan a hearing: "The Court orders defendants to give plaintiff a hearing on the 27 percent issue in compliance with Cal. Gov't Code §20134. If plaintiff disagrees with the outcome of that hearing, he should proceed to a state superior court for redress. If these procedures are followed, the Court finds no due process violation."

Judge Breyer named the state statute he wanted used when telling Defendants how to conform their conduct to State law and his order to "Defendants" did not distinguish *between* Defendants, and thus applied to all who submitted to the authority of federal court order as trade-off to let dismissal of the due process claims stand. Defendants did not appeal. Even when responding to Kaplan's appeal, Defendants only claimed Eleventh Amendment immunity as it applied to ADEA. It follows *all* the Defendants submitted to the federal court order and immunity ruling because *none* of Defendants appealed the ruling of the District Court.

When Defendants withdrew their immunity argument they submitted to federal jurisdiction, and in so doing Defendants, all of them, waived State immunity by their consent to submission of their rights for Judge Breyer's judicial determination. When Defendants did not appeal Judge Breyer's order, they again submitted to the jurisdiction of the federal court because Judge Breyer had the undisputed fact of Kaplan's two waivers before him so there were mixed questions of fact and law when he ruled there was no State immunity but dismissed Kaplan's ADEA claims on other grounds. Defendants made no appeal to his rejection of immunity and waited until August 11, 1999 to reintroduce the argument in the Court of Appeals even though they had

earlier submitted their rights for federal judicial determination by accepting both the District Court ADEA dismissal on other grounds and the ruling against immunity and had submitted to the District Court's order.

Where a State submits its rights for judicial determination, it will be bound thereby and cannot escape the results of its own voluntary act by invoking the prohibitions of the Eleventh Amendment, *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273, 284 (1906).

3. §21417 VIOLATES EQUAL PROTECTION CLAUSE

Because California lawmakers enacted a law based on the irrational belief old hire State peace officers were malingerers looking to bilk the State with undeserved disability pensions, Defendants denied a 50% pension pursuant to California Government Code §21417 which segregates and classifies disabled safety members such as over 40 at hire Kaplan into three injury causation categories, with one of three categories being denied 50% disability benefits.

For the unfavored cause of injury category §21417 limits the industrial disability pension to the lesser of 50% of final compensation or the amount the employee would have received in service benefits had the employee continued to work until the age of 55. (Kaplan's service benefit plan then provided 2.5% at 55.) In order to derive this latter amount, §21417 imposes a statutory ceiling of 55 and calculates an employee's "potential years of service" by subtracting the employee's age at hire from 55. The final compensation and "years of potential service" are the key variables in the calculation. The formula can be expressed as follows: monthly disability pension = 2.5% x monthly salary x (55 minus age at hire). If the "potential years of service" calculation is less than 50%, the employee received only the lower amount as a disability retirement, not the otherwise available 50%. Thus calculation of the retirement benefit

must as a first step identify the hire age, and *only* then can proceed to the second step which is subtraction of the hire age from the "potential service" age 55 cap. In mathematical terms, then, §21417 limits disability retirement pensions to the lesser of 50% or 2.5% x (55 minus age at hire). The calculation of "potential years of service" under section 21417 is a strict function of age and the only variable that matters in the calculation is the employee's age at hire. See *Arnett v. California PERS*, 179 F. 3d 690, 695 (9th Cir. 1999).

It had not always been so. From April 1, 1973 through 1979, §21292.5 (replaced with §21407 effective January 1, 1996) controlled PERS with *all* industrially disabled members getting at least but no more than 50%. Then, in January 1980, §21292.6 became law, authored by State Senator Newton R. Russell who said his law would reduce disability retirements by confronting injured older hires with reduced pensions. Thus §21292.6 (recodified as §21417 effective January 1, 1996) was specific in targeting employees hired at age 35 or older that were disabled by injuries Senator Russell didn't favor who were excluded from what under §21292.5 had been one plan, equally applied.

Section 21417 does not factor in the years a safety member can work, the average years older hires serve, or the mandatory 65 year old retirement age set by Government Code §20980.5 when Kaplan was hired, later recodified as §21132. Defendants used Kaplan's over 40 hire age and the arbitrary 55 cap to deny him credit for his years remaining before the normal retirement age of 65 envisioned by §21132. Age 55 was only when members were entitled to 2.5% for each service year, although service credit could be earned after age 55 up to a 32 year cap.

While §21417 targets old hires with an age 55 cap, its silent flipside ignores the fact not all young hires are able or desirous of working until age 55, such as a 30 at hire who only works 1 year before being fired in contrast with those in

their 40's who retire from agencies with other retirement plans then take PERS covered jobs and work another 20 years. Old hires are statistically less likely to be fired or quit than young hires but suffer because of the age-based "potential service" presumption. The average years served by members controlled by §21417 is comparable to young hires, they actuarially cost less to pay to term and are less frequently industrial disability retired than young at hire employees, and by their PERS contributions have been subsidizing younger hire employees.

Senator Russell's law created a three category cause of injury disability classification formula with distinctions between favored and unfavored causes of injuries. The invidious discriminatory mechanism in §21292.6/21417 was to segregate disabled old hires such as over 40 hire plaintiff to classify them on the basis of injury causation to deprive two out of three causation categories a 50% pension, although all younger than 35 at hire employees remained under the pre-existing law §21292.5 with its provision for 50% even though within that group were disabled members who *could* have been classified into three injury causation categories.

If §21417 provided equal protection *all* disabled members would be classified into three cause of injury categories, two of which would pay more than the other, or all disabled old hires would get less than 50%; however, only the old hire disabled State members controlled by §21417 are screened to determine if the cause of their disability is favored or unfavored after which they are segregated into the old hire three subcategories for (1) direct consequence of a violent act injuries with 50%, (2) performance of duties that are particularly hazardous and dangerous injuries with 50%, and (3) all other job-caused injuries without 50%.

When Defendants categorized Kaplan as having an unfavored disability causation they denied equal protection because his injury met the same disability threshold as fully

covered disabilities of similarly circumstanced old hires with favored injuries and of younger hire members who solely because of hire age were not subject to classification by favored and unfavored causes of injury.

The rate of §21417 controlled safety member industrial disability has plummeted since agencies abandoned maximum age 35 at hire rules, because as the average age at hire increased, the proportion of high-risk individuals in the work force decreased. Thus, the provision of 50% retirement for young hires for all categories of job disability while over 35 hires only receive 50% for two of the three disability categories is on its face an exploitive, arbitrary denial of equal protection with no rational justification.

The targeting of old hires with unfavored injuries was mean spirited and irrational. Senator Russell took a shotgun approach to deter older hire state employees from getting what in his view were unmerited industrial disability retirements. Instead of crafting legislation that would correct what he perceived of as shortcomings in a system that too readily acquiesced to employee applications for undeserved retirements, Senator Russell took steps to target industrially disabled older hire safety members with injury causation he did not favor for pension reductions to reduce disability retirements through deterrence . Senator Russell apparently believed an old hire job-injured employee confronted with the consequences of admitting to an unfavored injury and being cast out with a monthly pittance would suffer in silence until the mandatory retirement age of 65.

Senator Russell did not distinguish between employees who wanted to retire and applied to PERS and those retired by State request, so that in seeking to deter those who wanted out, Senator Russell also reduced pensions for those employees such as Plaintiff who the State found to be injured and who the State wanted retired.

An old hire returning from a routine task who has their State car struck by another vehicle gets a reduced pension if disabled due to the accident because getting hit by another

car while driving doesn't fit the PERS stereotype for a particularly hazardous and dangerous duty or a violent act. Defendants make no distinctions for injury severity after the industrial disability retirement threshold is reached and in classifying injuries that are all severe enough to result in disability retirement they will give an old hire disabled employee 50% for a back injured when engaged in hazardous duties because they favor that cause of injury, but will not give 50% to an old hire employee whose State car is struck by another vehicle even if the old hire is quadraplegically disabled.

Judge Breyer errored when he dismissed the equal protection claims, ruling "defendants' decision to use the age of 55 as a hypothetical retirement age is rationally related to its goal of decreasing costs" because older hires were comparable in average length of service, and are low risk, low cost employees. Judge Breyer also errored because it was the favoring of some causes of old hire disabilities with a full 50% pension over others that denied Kaplan his 50%.

To have believed §21292.6/21417 was rational a lawmaker had to believe (1) only old hires wanted a handout for undeserved disabilities, thus the segregation by age; (2) that no young hires would seek undeserved pensions by alleging unfavored disabilities, thus leaving all young hires to get the full 50%; (3) that old hires getting 50% for favored injuries would have worked beyond age 55; (4) that old hires without favored disabilities would not have worked beyond 55; (5) that old hires with undeserved, unfavored disabilities could manipulate the State into requesting their retirement; and (6) that disabled young hires deserved 50% no matter their cause of injury, but that old hires were only deserving of 50% for two favored causes of injury.

Cause of disability singled out unfavored old hire disabled members for reduced pensions after their hire age segregated them for cause of injury screening. Thus §21292.6/21417 was not rational legislation.

The equal protection clause of the Fourteenth

Amendment directs that all persons similarly circumstanced shall be treated alike, *Plyer v. Doe*, 457 U.S. 202, 216 (1982). Thus a plan that does not distinguish between favored and unfavored causes of injury for younger hire disability benefits, but so segregates/classifies older hires, is on its face a denial of equal protection. While "a State has a valid interest in preserving the fiscal integrity of its programs ... a State may not accomplish such a purpose by invidious distinctions between classes of its citizens ... saving ... costs cannot justify an otherwise invidious classification." *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). Therefore, when a statute classifies individuals and becomes the subject of judicial scrutiny, the State must do more than show that denying benefits to the excluded class saves money. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974).

The Equal Protection Clause of the Fourteenth Amendment §1 proscribes states from treating similarly situated persons differently and assures that governments will differentiate between their citizens only upon reasonable grounds that have a relationship to legitimate desired goals. Arbitrary state action can only burden rights on the basis of age if the action passes the rational basis test, i.e., it is rationally related to a legitimate government interest. See *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-447 (1985).

Defendants compel older hire State employees to pay into a system that profits from their contributions and saves millions by their presence in the work force, then casts out those job-disabled older hire workers who suffer unfavored disability causation with reduced pensions for injuries that would have paid full entitlement to similarly circumstanced young hires, or old hires with favored injuries. That is not

rational or legitimate.

§21292.6/21417 irrationally discriminates against the disabled and was intentionally enacted to treat unfavored cause of disability older hires differently than the young hires who remained covered by §21292.5, and who all received 50% even if they had an unfavored disability causation. Thus, Kaplan asks the court to review the below court's decision and find §21417 violates the Equal Protection Clause of the Fourteenth Amendment, §1.

4. NO NOTICE, PRE-RETIREMENT HEARING, OR POST-RETIREMENT HEARING

Defendants' denied a 50% pension without explaining why Kaplan who had suffered violence was denied the violence cause of disability 50% classification, and if not that at least 37.5% since State rules entitled him to full benefits after injury. They did not pre-action notify Kaplan of all their actions, the reasons for their decisions, or provide the materials upon which they were based, or an explanation of Defendants' evidence.

Although he never received an Accusation or explanation, Kaplan learned early in 1997 that PERS intended to retire him with only a 27% pension, so Kaplan asked to be heard on why he should get 50%, and, if not that, a 37.5% pension, but was not heard either before or after retirement despite his right to some sort of "Skelly" pre-action hearing and a California Government Code §3304(b) appeal as distinct from the post-denial evidentiary hearing that was also his right. Kaplan's complaint had claims for the denial of notice and pre-deprivation hearing that were distinguished from his claims for the post-retirement evidentiary hearing he was denied.

Kaplan's claims for deprivation of protections guaranteed by the due process clause of the Fourteenth Amendment were dismissed by the below court.

Judge Breyer errored when he dismissed those claims, and the Ninth Circuit erred when they affirmed because

Judge Breyer ruled "the property interest here is significantly less compelling than that of an individual who has been denied the very means by which to live. Less is due to plaintiff than to employees who were fully deprived of benefits" and also said "The Court rejects plaintiff's contention that a partial loss of benefits requires a predeprivation hearing." Thus, Kaplan's claims for denial of notice and any "Skelly" or §3304(b) type pre-deprivation appeal were dismissed.

Judge Breyer also errored in dismissing Kaplan's claims for denial of post-retirement hearing and due process as to why he was denied 50% even though Kaplan was injured by violence, Kaplan's pension was slashed 46%, and the Fourteenth Amendment §1 due process clause provides property cannot be taken without due process. Judge Breyer cited *Costello v. Town of Fairfield*, 811 F.2d, 782, 784 (2nd Cir. 1987) although that case concerned already retired plaintiffs already getting their pensions who wanted post-retirement pension increases from the town of Fairfield per a contract (*Costello*, 784), while Kaplan wanted to prevent a pension provided by State law from being slashed. Further, the *Costello* theory had been analyzed and rejected when it was determined pension entitlements are constitutionally protected property in *Portman v. County of Santa Clara*, 995 F.2d 898, 906 (9th Cir. 1993)

Kaplan's pension was reduced from 50% to 27% of final compensation, so the deprivation of 23% of final compensation at stake was 46% of his pension. Thus the below court ruling was in conflict with the Supreme Court teaching that provided a property deprivation is not *deminimus*, its gravity is irrelevant to the question of whether account must be taken of due process, *Gross v. Lopez*, 419 U.S. 565, 576 (1975). Also see *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 541-542 (1985); minimum due process required prior to discharge before employee is deprived of *any significant property interest* is that employee have access to the material upon which the

charge was based and can respond orally and in writing and present rebuttal affidavits at a *pre-termination* hearing (emphasis added).

This court held in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) that property interests are created by sources such as state law and rules or understandings that support claims of entitlement. Kaplan had "a legitimate claim of entitlement" (*Roth, id.*, 577) to 50% of final compensation arising from State law because he suffered violence, and because he was entitled to at least 37.5% if not 50%. Thus, there was significant deprivation of property. When protected interests are implicated, the right to some kind of prior hearing is paramount, and notice and an opportunity to be heard are essential (*Roth, id.*, 573).

5. BELOW COURT ERRORED BY REQUIRING EXHAUSTION OF STATE REMEDIES

The below court errored when it dismissed Claims for denial of the protections of the due process clause of the Fourteenth Amendment because Judge Breyer ruled "Court orders defendants to give plaintiff a hearing on the 27 percent issue in compliance with Cal. Gov't Code §20134. If plaintiff disagrees with the outcome of that hearing, he should proceed to a state superior court for redress. If these procedures are followed, the Court finds no due process violation."

The below court thereby imposed a burden upon Kaplan to exhaust state remedies before seeking federal relief. The federal violation that gave Judge Breyer jurisdiction to order Defendants to give Kaplan a hearing should have resulted in a ruling in favor of Kaplan's §1983 claims. There is no requirement for those deprived of significant property without due process to exhaust administrative or other State remedies, *Patsy v. Board of Regents*, 457 U.S. 496, at 507 (1982). Also in *Felder v. Casey*, 487 U.S. 131, 147 (1988) this high court reaffirmed that "plaintiffs need not exhaust state administrative

remedies before instituting §1983 suits in federal court." Kaplan did not know before his retirement that Defendants were going to separate him without due process, and after his retirement the federal violations were complete. Therefore, Kaplan was free to seek federal remedy.

Further, Kaplan was due compensable damages for a §1983 violation including mental and emotional distress actually caused by the denial of procedural due process, even if the employer's action is later held to be justified, thus below court is in conflict with *Cary v. Piphus*, 435 U.S. 247, 262-263 (1978) by awarding Kaplan nothing but a court order to Defendant State to give a belated hearing.

6. STATE DUE PROCESS REMEDIES DENIED IN PRACTICE

The teaching of the US Supreme Court is State remedies created by statute, regulations, and case law are relevant when those due process remedies are in practice denied. See *Zinerman v. Burch*, 494 U.S. 113, 124-126, and Footnote 11 at 126 (1990). The below court errored in ruling that Kaplan had no right to pre-retirement due process for a partial loss of benefits or damage to his liberty interests, because Kaplan had been denied due process required by State law and regulations.

The State of California has legislated, and California courts have mandated procedures that created property rights entitled to federal due process protection, and the taking that occurred without those due process protections triggered Kaplan's right to §1983 relief. (Please note the decisions now cited apply to both Kaplan's significant property rights discussed above in Question 5 *and* his liberty interests as will be discussed below in Question 7.)

Property interests are created and their dimensions are defined by existing rules or understandings that stem from a source, such as state law, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); cited in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985). The Due Process

Clause of the Fourteenth Amendment encompasses a "guarantee of fair procedure" and a §1983 action may be brought for a violation of and failure to provide procedural due process, making it necessary to ask what process the State provided because the denial of a right guaranteed by State law can be the issue pursuant to §1983. Thus §1983 was intended not only to override discriminatory or otherwise unconstitutional State laws but also to provide a federal remedy where the State remedy, though adequate in theory, was not available in practice and "the problem is the way those laws are or are not implemented by State officials," *Zinerman v. Burch*, 494 U.S. 113, 124-126, and Footnote 11 at 126 (1990).

Kaplan had been denied *pre-deprivation* safeguards ordered by the California Supreme Court of "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing to the authority initially imposing discipline," *Barber v. State Personnel BD.*, 18 C.3d 395, 401 (1976). [In California the public employees' pre-deprivation right to respond mandated by *Barber* is commonly known as a "Skelly hearing."]

Defendants did not give reasons why they denied Kaplan a 50% cause of injury classification, or why Kaplan was being denied the 37.5% that would otherwise be due, and did not provide the materials upon which those decisions or the decision to retire Kaplan were based, or provide copies of those materials. Further, Defendants concealed the fraudulent stigmatizing reasons they later publicly alleged were the basis for the retirement until months after the retirement, and even then did not provide the full required notice.

Kaplan had "a legitimate claim of entitlement" (*Roth, id.*, 577) to 50% of final compensation arising from State law because he suffered violence. Kaplan did not retain his full 50% pension, therefore there was deprivation of property for as noted above, §21417 provided 50% for violence-caused industrial disability. Because State rules entitled him

to at least 37.5% if not 50%, there was another deprivation of property.

Defendants could only have lawfully proceeded with retirement and pension deprivation by complying with laws and regulations mandating what PERS *must* do when Kaplan was subjected to employer-requested retirement and/or a benefit deprivation. Title 2, California Code of Regulations (C.C.R.), §555.3, provides "any member whose retirement for disability has been requested by his employer shall be entitled to a hearing. The Executive Office, upon determination that a member shall be retired for disability on such application, shall file an accusation and serve a copy thereof on the member and his employer" (emphasis added). Such regulations have the force of California law and are matters subject to mandatory judicial notice. See *Scott v. County of Los Angeles*, 27 Cal.App.4th 125, 145 (1994). Kaplan's employer requested his retirement; however, Defendants never served the required Notice (which must include an Accusation) or provided any hearing.

After he was retired, Defendants told Kaplan they would not give him a hearing on the 50% issue *because* he had alleged "age bias."

Pursuant to §11501(b) the PERS Board of Administration was controlled by §11500, et seq. and §11505(a) provides that the moving agency "shall serve a copy" of an Accusation "on the respondent as provided in subdivision(c)" and "shall include a postcard or other form entitled Notice of Defense," and that the copy of the accusation shall include or be accompanied by "a statement that respondent may request a hearing by filing a Notice of Defense as provided in Section 11506 within 15 days after service upon the respondent of the accusation." That was not done, although §11505(c) provides in regard to the Accusation that "no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served."

Section 11506 provides that within 15 days after

service of the Accusation the respondent may file with the agency a Notice of Defense, request a hearing, and may "admit the accusation in whole or in part." The respondent shall be entitled to a hearing on the merits "if the respondent files a Notice of Defense, and the Notice shall be deemed a specific denial of all parts of the Accusation not expressly admitted."

Therefore because §11505(c) explicitly mandated that Kaplan *not* suffer deprivation without prior compliance with statute as cited above, and §11505 and §11506 required explicitly defined *pre-deprivation* notice, and C.C.R. 555.3 had the force of State law (*Scott*, *supra*) and required an Accusation and hearing, a federally protected property right had been created and had been taken without due process.

Further, Kaplan had been denied his California peace officer due process rights created by State law as to his deprivation of property, and also as to his liberty interest. See *Sanchez v. City of Santa Ana*, 915 F.2d 424, 429-30 (9th Cir. 1990), cert. denied, 502 U.S. 815 (1991). A California peace officer has a federal constitutional property interest and due process right to a hearing when denied even minimal property and is also entitled to an administrative appeal under California law because California Government Code §3304(b) so provides.

After noting that §3304(b) provides that no punitive action may be taken without providing an officer with the opportunity for an administrative appeal, and that §3303 defines "punitive action" to include a reduction in salary, the *Sanchez* court (*supra*, at 430) found that because the peace officer who received a pay reduction was entitled to an administrative appeal under California law pursuant to §3304(b) of the [Peace Officer] State Bill of Rights and was never given an opportunity of any kind to contest the pay reduction, "his property interest was taken without due process." Thus since Kaplan as a peace officer entitled to administrative appeal pursuant to §3304(b) was never given an opportunity of any kind to contest the reduction, "his

property interest was taken without due process." (*Sanchez* at 430, *supra*).

Barber v. State Personnel Bd (supra); Cal. Gvt. Code §3304(b); the "shall file" language of Title 2, California Code of Regulations (CCR) §555.3; Cal. Gvt. Code §11500 et seq. with the "no order shall" language of §11505(c) all were violated. Kaplan's interests were protected. When protected interests are implicated, the right to some kind of prior hearing is paramount (*Board of Regents v. Roth, supra,* 570) and notice and an opportunity to be heard are essential (*Roth, supra,* 573).

Further, the California State Supreme Court has ruled a public safety officer's dismissal, demotion, suspension, reduction in salary, or written reprimand is "per se disciplinary in nature, irrespective of the employer's purported reason for the personnel action," and are "by nature penalties, no matter for what reason imposed." *White v. County of Sacramento*, 31 Cal. 3d 676, 682-683 (1982). Plaintiff was not provided notice or his §3304(b) appeal. *White (supra)* and a long line of California cases make it black letter California law that calling a peace officer something as stigmatizing as being clinically depressed, or calling him "medical" for petitioning for redress or engaging in off-duty union activity is written reprimand under §3304(b).

Kaplan had a liberty interest entitlement to be free from stigmatizing allegations in Defendants' records in course of termination (*Roth, id.*, 573). Branding Kaplan as medically unfit *and* clinically depressed triggered due process protections, however Defendants concealed the fraudulent stigmatizing reasons they later publicly alleged were the basis for the retirement until months after the retirement, and never provided the required notice.

Protections against reputation damage and foreclosure of other employment opportunities are set out in *White (supra),* and *Lubey v. City and County of San Francisco*, 98 Cal. App. 3d 340 (Nov. 1979) which define California peace

officer entitlements. Pursuant to *Lubey* a peace officer may not be dismissed without a *pretermination* hearing and adequate notice. When terminated the entitlement is to a file free of charges unless due process is afforded because after a stigmatizing statement is acted on and filed, it limits occupational liberty (*id.* 345-346, 349). *Lubey* provides stigmatization takes place when officer is terminated on charges, whether or not they are made public, hence *pre-deprivation* due process is required. *Lubey* entitlements further provide that when an officer's employment is terminated on charges made without due process his reputation is stigmatized *and* his chances of future employment in his chosen field, and elsewhere, are seriously impaired, and community standing is seriously damaged (*id.* at 346-347).

Kaplan met the test for Federal §1983 remedy with fact of exclusion from the PERS system on damaging and work preclusive "clinically depressed" charges, the fact he was denied the *White* and *Lubey* entitlements created by State case law, and because his §3304(b) appeal had been denied.

7 BELOW COURT ERRED RULING *ONLY* MORAL TURPITUDE CHARGES IMPLICATE A LIBERTY INTEREST

Kaplan claimed he was denied the protections of his liberty interest guaranteed by the due process clause of the Fourteenth Amendment. Defendants had fraudulently alleged Kaplan was disabled because of so-called "medical" problems such as petitioning for redress and engaging in off-duty union activity they attributed to being clinically depressed. That stigmatized Kaplan as having serious "clinically depressed" medical condition even though he was never so diagnosed and the State's physician found Kaplan's cause of injury external to him.

Defendant's false statements made under color of law were so seriously stigmatizing as to damage Kaplan's standing in the community, effectively preclude future work

in Kaplan's chosen profession and otherwise seriously impair his ability to earn a living. Defendants did not provide Kaplan pre-action notice or other due process for those stigmatizing allegations. Defendants never noticed Kaplan of all their reasons, or provided the materials (or copies) upon which the allegations were based, or explanation of their evidence, even after the allegations were publicly made in March 1998. Those allegations publicly made were false and could have been corrected had Kaplan been provided pre-action notice and a pre-action appeal because *all* medical evaluations of Kaplan showed he was *never* diagnosed as suffering from clinical depression and the State's physician had recommended he be allowed to petition for redress and engage in off-duty union activity as accommodations to return him to work.

Judge Breyer erred in dismissing and the Ninth Circuit erred in affirming by ruling "Only 'charges that carry the stigma of moral turpitude' such as dishonesty or immorality may implicate a liberty interest ... Accordingly, plaintiff was not entitled to due process on this claim." The below court's ruling was in conflict with the teaching of the US Supreme Court that charges other than "moral turpitude" *can* implicate a liberty interest. Branding a person as clinically depressed and saying petitioning for redress and engaging in off-duty union activity were "medical" without evidence for the charges crossed the threshold established when this high court found government allegations of an alcohol problem were stigmatizing and implicated liberty interests in *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), wherein the U.S. Supreme Court ruled where the State "attaches a badge of infamy" to the citizen, due process comes into play *(id*, 437).

Had Defendants relied on their own physician's reports that the cause of Kaplan's injury was external to Kaplan and that there was no reason why Kaplan could not work for the State with accommodations, or as a peace officer for another employer, Kaplan would have been unencumbered in seeking

other employment. Instead, Defendants conjured up so-called "clinically depressed" allegations that were a condemnation of protected activity and totally unsupported by any medical evidence. The fact of Kaplan's involuntary retirement from the Public Employees Retirement System on a fraudulent allegation of being clinically depressed is in itself proof of significantly reduced employment opportunities.

When Kaplan was branded as medically unfit for his duties *and* clinically depressed that triggered due process protections. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented See *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). When protected interests are implicated, the right to some kind of prior hearing is paramount, *Board of Regents v. Roth* (*supra*, 570). Where a person's good name, reputation, and honor is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential to provide the person an opportunity to clear his name (*id.* 573).

In ruling that Kaplan had no right to due process on the "clinically depressed" allegations, the below court also erred because Kaplan had been denied the due process required by State law and regulations. California law provides such stigmatizing statements were punitive and triggered due process protections. State of California procedures had created property rights entitled to federal due process protection, as demonstrated above by citation of *Barber (supra), White (supra), Lubey (supra),* and §3304(b). Thus, the taking that occurred without State due process triggered Kaplan's right to §1983 relief because the State remedy, though adequate in theory, was not available in practice, *Zinerman (supra).*

Lubey v. City and County of San Francisco, 98 Cal. App. 3d 340 (Nov. 1979) defined peace officer entitlements as detailed above: a peace officer may not be dismissed without a *pretermination* hearing and adequate notice; when terminated the entitlement is to a file free of charges unless

due process is afforded because after stigmatizing statement is acted on and filed, it limits occupational liberty (*id.* 345-346, 349); stigmatization takes place when officer is terminated on charges, whether or not they are made public, hence *pre-deprivation* due process is required; when officer's employment is terminated on charges made without due process his reputation is stigmatized *and* his chances of future employment in his chosen field, and elsewhere, are seriously impaired, and community standing is seriously damaged (*id.* at 346-347).

Thus Kaplan met the test for §1983 remedy with fact of exclusion from the PERS system on a damaging and work preclusive fraudulent clinically depressed charge, and denial of *White* and *Lubey* entitlements and §3304(b) appeal entitlement which created a protected interest. See *Roth (supra); Zinerman (supra).*

8. DISTRICT COURT ERRED DISMISSING FIRST AMENDMENT VIOLATION CLAIMS ON SUBJECTIVE MOTIVATION THEORY

Kaplan said there was violation of his First Amendment right to protected speech and to petition government for redress when he was denied his preretirement appeal and his evidentiary appeal on the 50% and 37.5% because he opposed age discrimination and petitioned government for redress, and because the allegations of "medical" clinically depressed performance problems were a condemnation for petitioning for redress and engaging in off-duty union activity.

The below court errored when it dismissed by ruling Kaplan had to put forward evidence supporting allegations of subjective motivation. That was in conflict with the U.S. Supreme Court teaching that proof of subjective belief is not required. See *Gomez v. Toledo*, 446 U.S. 635, 639-641 (1980). In *Crawford-El v. Britton*, 523 U.S. 574, at 587 (1998) the Supreme Court reaffirmed a single objective standard by which government officials are liable for civil

damages when their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. The *Crawford-El* court also held (at 592) that the First Amendment bars retaliation for protected speech.

Defendants told Kaplan they would not give Kaplan a hearing on the 50% issue *because* he challenged "age bias," even though he had the right to "make a record" of exactly what it was Defendants were doing to him, whether or not age bias was a factor. Kaplan did present sufficient evidence per *Gomez (supra*, at 638) when he said Defendants refused him an appeal to which he had the right by the U.S. Constitution and the laws, because he complained "on grounds of ... 'age bias'" and that it is the custom, practice, and policy of Defendants under color of law to deny due process to State safety members whose employers request their retirement and those who challenge age discrimination in denial of pension benefits. Defendants could be reasonably expected to know Kaplan had appeal rights that should not be denied because he challenged age bias.

In *Crawford-El (supra,* 601) Justice Kennedy, concurring, wrote "even as to prisoners the Government must obey always the Constitution." So too should it be with the PERS functionaries who by deprivation of rights and false statements can damage the futures of job disabled peace officers who have already lost their careers.

Defendants retired Kaplan and did so with a slashed pension because he petitioned for redress and engaged in off-duty union activity, that being an unlawful chilling penalty for protected speech.

From the content of Kaplan's petitions for redress and the concerns expressed while engaging in off-duty union activity, Defendants could be reasonably expected to know they consisted of protected speech, particularly since those examples of free expression were addressed in the reports of the State's physician who found in favor of the cause of injury identified by Kaplan, and in favor of those protected

activities. Defendants could be expected to know the law required notice and a pre-retirement hearing rather than keeping their fraudulent branding of Kaplan as "clinically depressed" a secret until months after retirement and then going public with the allegation.

Had Defendants served upon Kaplan the Notice which federal and state law required, and had Defendants provided the name-clearing administrative "Skelly" type pre-retirement hearing the law required, their fraudulent accusations would have collapsed for none of the medical reports supported their stigmatizing allegations. Quite the opposite.

The allegation that Kaplan had clinically depressed job problems was a condemnation of Kaplan for exercising his rights to protected speech and to petition government for redress because the alleged medical "problems" consisted of engaging in those protected activities, and was fraudulent because the State's physician had recommended those protected activities as accommodations to enable Kaplan to work, and because there was no medical evidence Kaplan was ever clinically depressed.

Because of Kaplan petitioning for redress, Defendants publicly in connection with his medical retirement alleged Kaplan had "clinically depressed" problems. Defendants had used those allegations of medical work problems for the reduction of Kaplan's pension from 50% to 27% of final compensation, a lifetime penalty for engaging in protected activity. Government cannot justify retaliation against whistleblowers, *Johnson v. Multnomah County, OR.*, 48 F.3d 420, 427 (9th Cir. 1995), cert. denied, 115 S.Ct 2616 (1995). To deny a benefit, government may not rely on a basis that infringes constitutionally protected interests–especially freedom of speech. *Perry v. Sindermann*, 408 U.S. 593, 596-597 (1972). A state may not discharge a public employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech. *Rankin v. McPherson*, 483 U.S. 378, 383 (1987).

CONCLUSION

In dismissing the ADEA claims, the Ninth Circuit Court of Appeals decided important federal questions in a way that conflicts with *Atascadero (supra)*, and *Gunter (supra)*, the relevant decisions of the U.S. Supreme Court as to waiver of immunity and immunity abrogation by conduct, thereby creating a real and intolerable conflict on the same matter of law.

In affirming the dismissal of all other claims by Judge Breyer on his reasons, the Ninth Circuit Court of Appeals decided important federal questions in a way that conflicts with the relevant above-cited decisions of the U.S. Supreme Court and creates a real and intolerable conflict on the same matters of well-settled law decided by the long line of above cited cases of this high court.

For the reasons set forth above, a writ of certiorari should issue to review the decision of the below court that all Kaplan's claims be dismissed pursuant to the rulings described above.

With the exception of Claim 4 (for cruel and unusual punishment which Kaplan had attempted to withdraw and did not appeal) Kaplan seeks reinstatement of all dismissed claims pursuant to the above-cited teaching of the US Supreme Court.

Dated: October 19, 2000

Respectfully submitted,

Gene Kaplan

Gene Kaplan, Petitioner *Pro se*
120 Tingley Street
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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE KAPLAN, Plaintiff-Appellant v. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM; CALIFORNIA BOARD OF ADMINISTRATION OF PERS; STATE OF CALIFORNIA, as administrator of PERS and as plaintiff's employer; JAMES E. BURTON, Chief Executive Officer, in that person's official and individual capacity, CHRIS NISHIOKA, Supervisor, PERS Benefit Services Division; SUPERVISOR, PERS BENEFIT APPLICATION SERVICES DIVISION; LIAISON, PERS LEGAL OFFICE; SUPERVISOR, PERS LEGAL OFFICE; SUPERVISOR, PERS APPEALS DIVISION, Defendants-Appellees	No. 99-15295 D.C. No. CV-98-01246 -CRB MEMORANDUM[1] FILED MAY 3, 2000

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit as may be provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted April 17, 2000[2]

Before: KOZINSKI, RYMER, and FISHER, Circuit Judges.

Gene Kaplan appeals pro se from the district court's dismissal of his civil rights action, which alleged various constitutional and statutory violations related to the determination of his state retirement benefits. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the dismissal of claims under Fed. R. Civ. P. 12(b)(6) de novo. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). The applicability of Eleventh Amendment immunity is reviewed de novo. *See Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 838 (9th Cir. 1997). We affirm.

To the extent Kaplan contends the district court erred in dismissing his claims based on alleged violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., his contention is without merit. The Eleventh Amendment bars Kaplan's ADEA claims. *See Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 650 (2000); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

We affirm the district court's dismissal of Kaplan's remaining claims for the reasons stated in the district court's September 3, 1998 Memorandum and Order.

AFFIRMED.

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[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, appellant's request for oral argument is denied.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE KAPLAN, Plaintiff-Appellant v. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM; CALIFORNIA BOARD OF ADMINISTRATION OF PERS; STATE OF CALIFORNIA, as administrator of PERS and as plaintiff's employer; JAMES E. BURTON, Chief Executive Officer, in that person's official and individual capacity, CHRIS NISHIOKA, Supervisor, PERS Benefit Services Division; SUPERVISOR, PERS BENEFIT APPLICATION SERVICES DIVISION; LIAISON, PERS LEGAL OFFICE; SUPERVISOR, PERS LEGAL OFFICE; SUPERVISOR, PERS APPEALS DIVISION, Defendants-Appellees	No. 99-15295 DC# CV-98-01246 -CRB Northern California (San Francisco) ORDER FILED JULY 24, 2000

Before: KOZINSKI, RYMER, and FISHER, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed appeal.

[Filed: Jul 24, 2000]

APPENDIX C

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GENE KAPLAN

Plaintiff,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEMS (PERS), et al.,

Defendants

/

No. C 98-1246-CRB

MEMORANDUM AND ORDER

ORIGINAL FILED
SEP 03, 1998

Defendants have brought a motion to dismiss plaintiff's suit alleging that the California Public Employee Retirement System's ("PERS") formula for calculating disability retirement allowances violates the Age Discrimination and Employment Act of 1967 ("ADEA"), and that defendants violated several of his constitutional rights. Defendants have moved to dismiss the case on the grounds that: (1) Congress did not validly abrogate the sovereign immunities of government entities in ADEA cases; (2) plaintiff does not state a claim upon which relief may be granted because the PERS formula does not violate the ADEA; (3) plaintiff does not state a due process, equal protection, section 1983 or Eighth Amendment claim; (4) plaintiff failed to exhaust his administrative remedies; and (5) this Court lacks subject matter jurisdiction over plaintiff's state law claims. Defendants also argue that the state of California should be dismissed as a defendant for insufficiency of service of process. Finally, defendants move in the alternative for a more definite statement of plaintiff's claims. Plaintiff has

also made a motion to be awarded the costs and fees of formal service on the State of California. Having considered the pleadings and declarations submitted by the parties and the oral arguments made on August 14, 1998, the Court GRANTS defendants' motion to dismiss plaintiff's ADEA, equal protection, due process, section 1983 retaliation, and Eighth Amendment claims, and GRANTS plaintiff's motion for costs of service.

FACTUAL BACKGROUND

Pro se plaintiff Gene Kaplan is a retired former peace officer investigator for the state of California. As a state employee, he was enrolled in the Public Employees' Retirement Systems (PERS), a state benefit program that provides retirement and disability benefits to state and local government employees. Plaintiff was hired by the state on May 20, 1985, when he was 40 years old. In May 1990, plaintiff was injured on the job and removed from work. Plaintiff was medically examined on behalf of the state in 1993 and 1995, and according to plaintiff, the 1995 examination found that he could still work, subject to limitations. Nevertheless, in November 1996, the state made an application for plaintiff's retirement under PERS disability retirement provisions, and plaintiff never returned to work. PERS sent plaintiff a letter dated March 28, 1997, notifying him that he would retired [sic] under PERS' disability retirement plan. On April 21, 1997, plaintiff sent a letter to the PERS Benefit Application Services Division opposing the disability allowance calculated for him.

Generally, industrially disabled employees receive a disability retirement allowance of 50 percent of his or her final compensation. See Cal. Gov't Code § 21411. Under Cal. Gov't Code § 21417, however, this amount is capped, limiting industrial disability retirement allowances to the lesser of: (1) 50 percent of the employee's final compensation; or (2) an amount determined by a formula which calculates the service pension an employee would

have earned had they worked until the age of 55.[1] The general consequences of this statutory cap is that any safety member who is hired after the age of 35 would always receive less than the 50 percent industrial disability retirement allowance that an employee hired at a younger age would receive.[2] Plaintiff, for example, is at most entitled to only 37.5 percent (15 years of potential service multiplied by 2.5 percent), rather than 50 percent, of his final compensation.

On March 28, 1997, PERS sent plaintiff a letter notifying him that his disability retirement allowance would be approximately 27 percent of his final compensation. According to plaintiff, PERS did not explain its decision, and on May 24, 1997, plaintiff requested a timely administrative appeal of the retirement allowance calculation. Plaintiff hoped to convince PERS that the formula was age discriminatory; failing that, he planned to argue that his disability fell into one of the two section 21417 exceptions (and thus he was entitled to a 50% allowance), or at the very least that he was entitled to 37.5 percent rather than 27 percent. PERS sent plaintiff an acknowledgment of its receipt of the appeal request on May

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[1] The formula is: potential years of service (55 minus age at hire), multiplied by two percent, multiplied by a statutory multiplier determined by age at retirement. See Cal. Gov't Code § 21363. Under Cal. Gov't Code § 21417, the hypothetical retirement age is 55, which means a statutory multiplier of 1.25 under section 21363. Essentially, then, the formula under section 21417 is: potential years of service multiplied by 2.5 percent.

[2] The two exceptions are for members "whose disability results from an injury that is a direct consequence of a violent act perpetrated upon his or her person or occurs during the performance of those portions of his or her duties that are particularly hazardous or dangerous"; those employees are entitled to the 50% allowance. See Cal. Gov't Code § 21417. PERS determined that plaintiff did not fall into either of these exceptions to section 21417.

26, 1997, but he heard nothing more from PERS until he received a Notice of Termination dated June 27, 1997. On July 1, 1997, his PERS member account was closed and he was taken off the state payroll. Plaintiff filed a claim for damages with the State Board of Control on September 22, 1997, and in December 1997, he received a letter denying his request with a warning that he only had six months from the date the letter was sent to file a court action. Plaintiff filed a complaint with the EEOC on January 12, 1998, and in March 1998, defendants offered plaintiff a hearing on the issue on June 23, 1998. It is unclear from the parties' papers whether or not this hearing ever took place. On April 28, 1998, plaintiff filed his First Amended Complaint with this Court.

Plaintiff's First Amended Complaint names the following as defendants: California Public Employees Retirement System (PERS); James E. Burton, Chief Executive Officer, in his official and individual capacity; Chris Nishioka, supervisor, PERS Benefit Services Division, in his official and individual capacity; PERS employees J. Doe 1 through 7, in their official and individual capacities; California Board of Administration of PERS; and the State of California. PERS, Burton, Nishioka and the Board of Administration are the moving parties in this motion to dismiss; the State of California has moved to join the motion.

STANDARD OF REVIEW

A motion to dismiss should not be granted unless it appears beyond a doubt that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). For purposes of such a motion, the complaint is construed in a light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true. See Everest and Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994).

The Court must liberally construe a pro se pleading because "it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

DISCUSSION

I Eleventh Amendment Immunity

Defendants' first argument is that the Eleventh Amendment shields the states from the ADEA because Congress did not enact legislation through a valid exercise of power. This Court disagrees. Though the Ninth Circuit has not yet decided the Eleventh Amendment immunity issue, see Carmen v. San Francisco Unified School Dist., 982 F. Supp. 1396, 1405 (N.D. Cal. 1997), this Court finds that the ADEA satisfies the two-part test for abrogation of state sovereign immunity articulated in Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55-73, 116 S. Ct. 1114, 1123-32, 134 L. Ed. 2d 252 (1996).

The Eleventh Amendment generally bars citizen suits against a state and its agencies and instrumentalities. See Seminole Tribe, 517 U.S. at 54, 116 S. Ct. at 1122. Congress can, however, abrogate state immunity through: (1) an equivocal expression of its intent to do so; and (2) an act pursuant to a valid exercise of its power. See id. at 1123-32. In Duffy v. Riveland, 98 F.3d 447, 453-56 (9th Cir. 1996), the Ninth Circuit held that Congress satisfies this first requirement by including "unmistakably clear statutory language." The ADEA's express authorization for the maintenance of suits against state employers clearly demonstrates Congress' intent to abrogate states' Eleventh Amendment immunity. See Carmen, 982 F. Supp. at 1406 (citing Hurd v. Pittsburg State University (Hurd I), 821 F. Supp. 1410, 1413 (D. Kan 1993), affirmed in Hurd v. Pittsburgh State University (Hurd III)), 109 F.3d 1540 (10th

Cir. 1997)). Thus, Congress satisfies the first prong of the Seminole Tribe test.

As for the second requirement, an exercise of power is valid if Congress acts pursuant to a constitutional provision granting Congress the power to abrogate. See Seminole Tribe, 116 S. Ct. at 1125. According to the Supreme Court, the Fourteenth Amendment grants just such powers. See id. Prior to Seminole Tribe, the Supreme Court based the validity of the ADEA on Congress' exercise of its Commerce Clause powers, see EEOC v. Wyoming, 460 U.S. 226, 243, 103 S. Ct. 1054, 1064, 75 L. Ed. 2d 18 (1983), but declined to decide whether Congress passed the 1974 ADEA amendments pursuant to its Fourteenth Amendment power. See id. & n. 18. Since then, the majority of circuit courts which have considered the issue have concluded that the 1974 amendments to the ADEA were enacted pursuant to section five of the Fourteenth Amendment. See Hurd III, 109 F.3d at 1544-45; Davidson v. Board of Governors, 920 F.2d 441, 443 (7th Cir. 1990); EEOC v. Elrod, 674 F.2d 601, 608 (7th Cir. 1982); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 699-700 (1st Cir. 1983); Arritt v. Grisell, 567 F.2d 1267, 1270-71 (4th Cir. 1977); Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 31 (2d Cir. 1991) (dicta). The test to determine whether legislation is enacted pursuant to section five of the Fourteenth Amendment is whether the objectives of the legislation are within Congress' power under the amendment. See Fullilove v. Klutznick, 448 U.S. 448, 473, 100 S. Ct. 2758, 2772, 100 S. Ct. 2758, 2772, 65 L. Ed. 2d 902 (1980). The ADEA follows the same legislative pattern as Title VII. Extending the Act to the states was originally proposed in 1972, at the same time that similar Title VII amendments were under consideration by Congress, and the final enactment of the 1974 amendment extended coverage to both public and private employees on the same basis. See Elrod, 674 F.2d at 608. The objectives of the ADEA are clearly tied to the guarantee of the Equal Protection Clause of the Fourteenth Amendment, see id. at

608-609, and thus, Congress did act pursuant to its powers under section five of the Fourteenth Amendment, and the ADEA does apply to the states.

II. ADEA Claims

Plaintiff contends that the PERS disability retirement allowance formula impermissibly discriminates on the basis of age by classifying employees on the basis of age and favoring the younger employers [sic]. The ADEA prohibits discrimination based on age against individuals over 40. See 29 U.S.C. § 623 (a)(1). Plaintiff's alleging discrimination under the ADEA may proceed under two theories of liability: "disparate treatment" or "disparate impact." See Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990) (citing Palmer v. United States, 794 F.2d 534, 536 (9th Cir. 1986)). The Court finds that plaintiff does not state a claim under either theory.

A. Disparate Treatment

Plaintiff argues that section 21417 violates the ADEA because it treats safety members who are older than 35 at the time of hire unfavorably compared to those are younger than 35 at the time of hire. The younger ones are entitled to the entire 50 percent of final compensation for industrial disability retirement while the older ones can only receive less than that amount.

Under a disparate treatment theory, the plaintiff must show intentional discrimination. "In order to prove disparate treatment, a plaintiff may assert either that the employer's challenged decision stemmed from a single illegitimate motive . . . or that the decision was the product of both legitimate and illegitimate motives." Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1109 (9th Cir. 1991). The plaintiff must establish by a preponderance of the evidence that age was a determining or motivating factor. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706, 123 L. Ed. 2d 338 (1993). "[T]here is

no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." Id. at 609, 113 S. Ct. at 1705.

The Court has already dismissed with prejudice a similar disparate treatment claim in Arnett v. CA Employees' Retirement, 1998 WL 118180, at *1 (N.D.Cal. March 2, 1998). As in Arnett, the Court finds that nothing in the face of section 21417 suggests that the employee's age is the controlling factor which determines the amount of a disabled employee's industrial disability retirement allowance. Every worker's disability retirement allowance is calculated through the same method under section 21417, regardless of age. It is the employee's potential years of service, not his or her age at retirement, that is the critical factor under section 21417. The employee's age at the time of hiring is a relevant factor—but not a determining factor—only in that hiring age is necessarily related to potential years of service. "When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." Hazen Paper, 507 U.S. at 611, 113 S. Ct. at 1706. The use of the age of 55 for the purposes of calculating potential years of service is not a mandatory retirement age, as plaintiff alleges. Plaintiff ignores the fact that fixing a hypothetical retirement age is necessary for determining potential years of service. Once that retirement age is determined--whether it is 55 or 95--a 30-year-old will always have more years of potential service than a 40-year-old.

The 7th Circuit has found that "decisions based on criteria which merely tend to affect workers over the age of 40 more adversely than workers under forty are not prohibited." EEOC v. Francis W. Parker School, 41 F.3d 1073, 1077 (7th Cir. 1994). Unless plaintiff can demonstrate that the a [sic] decision based on years of service is a pretext for a stereotype-based rationale, he has not shown that the decision was necessarily age based. See id at 1078 (7th Cir.

1994) (citing Hazen Paper, 507 U.S. at 611, 113 S. Ct. at 1706). Plaintiff offers little evidence that section 21417 was enacted based on unsupported stereotypes about older workers or other discriminatory intent. He does little more than allege that State Senator Newton R. Russell (R-Glendale) introduced section 21417 in order to protect the state from "over 40 at hire employees who were stereotypically stigmatized as presumed malingers or injury-prone weaklings." See Plaintiff's First Amended Complaint at 14:22-23. Conclusory statements about what plaintiff believes were Sen. Russell's intentions are hardly sufficient to show that age was a motivating or determining factor behind section 21417. Moreover, the Court notes that even the much stronger evidence concerning intent offered by plaintiffs in Arnett was not enough to survive dismissal of the disparate treatment claim. After analyzing the statute and its legislative intent, Judge Armstrong determined that there was no discriminatory intent:

> The legislative history of Senate Bill 454 establishes that the California Legislature was concerned that a significant percentage of safety workers were receiving disability benefits in an amount greater than they would have otherwise received had they worked until retirement. To avoid this anomaly, the Legislature simply corrected the amount of disability retirement benefits to the employees' years of potential service. It is evident to the Court that no discriminatory animus against older workers motivated the passage of Senate Bill 454.

Arnett v. CA Employees' Retirement, No. 95-3022 (N.D. Cal. Nov. 12, 1996). The fact that employees who were hired in their twenties also have their potential disability allowances sharply limited by statute is further evidence that

there is no discriminatory intent behind section 21417.[3] Thus, plaintiff has not stated a disparate treatment claim under the ADEA, and the Court dismisses this claim with prejudice.

B. Disparate Impact

Plaintiff is also proceeding under a disparate impact theory. Again, the Court has already addressed and dismissed a very similar claim in Arnett, and plaintiff offers no persuasive argument as to why this Court should treat his disparate impact claim any differently.

"Claims that stress 'disparate impact' involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Hazen Paper, 507 U.S. at 609, 113 S.Ct. at 1705-06 (quoting Teamsters v. United States, 431 U.S. 324, 335-336, n. 15, 97 S. Ct. 1843, 1855, n. 15, 52 L. Ed. 2d 396 (1977)) (quotation marks omitted). Intentional discrimination does not need to be established in order to prove disparate impact. See Sischo-Nownejad, 934 F.2d 1104, 1109 (9th Cir. 1991).

Neither the Supreme Court nor the Ninth Circuit has explicitly decided whether a plaintiff may state a disparate impact claim under the ADEA, but previous Ninth Circuit cases have approved of the theory. See Mangold v. California Public Utilities Commission, 67 F.3d 1470, 1474 (9th Cir. 199[sic]); EEOC v. Local 350, 998 F.2d 641 (9th Cir. 1993); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990). As in Arnett, the Court will assume, without actually deciding, that plaintiff may state a disparate impact claim.

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[3] Section 21413 would set a 50 percent limit on the disability allowance of an employee hired at age 25. Absent this provision, that employee would be eligible to receive approximately 75 percent (2.5 percent multiplied by 30 years of potential service) of his or her final salary.

Plaintiff's argument that section 21417 more harshly affects employees who were hired after the age of 40 has some merit. However, as noted above, that in itself is not enough to proceed on an age discrimination claim. See Francis W. Parker School, 41 F.3d at 1077. First of all, the method for determining PERS disability allowance is similar to the PERS service pension program, a provision the plaintiff does not challenge. Other circuits have upheld pension plans that base retirement allowances on factors related to age. See Quinones v. City of Evanston, 58 F.3d 275, 278-79 (7th Cir. 1995) (holding that the ADEA "preserves employers' right to distinguish among employees by the years of service, even though years of service are related to age"); Atkins v. Northwest Airlines Inc., 967 F.2d 1197, 1201 (8th Cir. 1992) (holding that "[f]ederal law does not forbid early retirement discounts or service caps"). Unless the employer wants to provide one uniform disability allowance for all employees, any method of calculating these allowances must necessarily use a hypothetical retirement age and the employee's age at hire to determine potential years of service.

Second, defendants' method of calculating disability benefits is justified by business necessity. In Quinones, the 7th Circuit held that not paying any benefits at all to older workers violated the ADEA. See Quinones, 58 F.3d at 279. In laying out what the employer may do, however, the Quinones court approved of a defined-benefit plan--defined as one "under which the pension is some percentage of the terminal wage, times the number of years worked"--that distinguished between employees based on their at-hire ages, because employees who are hired at a later age cost the employer more than employers hired at a younger age in terms of fewer contributions and lost interest. See id. This Court found in Arnett that "the legislature asserted cost-saving concerns as its basis for enacting the PERS provisions." See Arnett, 1998 WL 118180 at *3. Since minimizing the cost of labor is a legitimate business

consideration, see Abbott v. Federal Forge, Inc., 912 F.2d 867, 875 (6th Cir. 1990), and over-40 hires cost more, defendants are justified in giving over-40 hires less in retirement allowances.

Plaintiff's claim that there is statistical data within defendants' possession showing that over-40 hires actually cost the state less is mere speculation. He has no basis upon which to make that claim. Plaintiff has relied on wholly conclusory allegations at the pleading stage while hoping to find data to support his claim through discovery; such fishing expeditions are not permissible under federal discovery rules. His hypothetical scenario of a 40-year-old re-entering the work force after her children are in college with the intention of working until age 65 having more potential years of service than a 30-year-old who only intends to work until the age of 50 is entirely possible, but he has no evidence that this is more apt description of the work force than PERS' logical conclusion that a 40-year-old is likely to work fewer years than a 30-year-old. Plaintiff's disparate impact claim is legally insufficient, and therefore the Court dismisses it with prejudice.

II. Constitutional Claims

Plaintiff also makes a number of constitutional claims against defendants, alleging violation of his equal protection, Eight Amendment, procedural due process rights, as well as section 1983 claims based on those violations and section 1983 retaliation. The Court finds that none of these claims have merit, and accordingly, they are dismissed.

A. Equal Protection

Reading the pro se plaintiff's complaint liberally, it appears that plaintiff is claiming that the ADEA violates his equal protection rights under the Constitution. Classifications that disadvantage a suspect class, or that impinge upon the exercise of a fundamental right have been found by the Supreme Court to be "presumptively invidious"

and violative of the equal protection. See Plyler v. Doe, 457 U.S. 202, 216-17, 102 S. Ct. 2382, 2394-95, 72 L. Ed. 2d 786 (1982) (ruling that illegal aliens are not a suspect class). The Supreme Court, however, has also made it clear that classifications based on age do not merit "strict scrutiny" under the Constitution. See Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13, 96 S. Ct. 2562, 2566, 49 L. Ed. 2d 520 (1976). Classifications based on age are analyzed under the less rigorous "rational basis" standard, under which laws are "presumed to be valid," see id. at 314, and the mere fact that the classifications are imperfect is not sufficient to invalidate the law. See id. at 316. An age-based classification is constitutionally valid if it is rationally related to furthering a legitimate state interest. See id. at 314. The burden is on plaintiff to "convince the court that the . . . facts on which the classification is apparently based could not reasonably be conceived to be true by the . . . decisionmaker." Vance v. Bradley, 440 U.S. 93, 111, 99 S. Ct. 939, 949, 59 L. Ed. 2d 171 (1979).

First, as explained in the ADEA section, plaintiff has not shown that age is the motivating or determining factor in calculating PERS disability retirement allowances. But even assuming that age is a motivating factor, plaintiff has failed to allege any facts which show that age is not rationally related to defendants' cost justification. While it may be true that there are some employees hired at the age of 40 or older who would work more years than some employees hired at the age of 30, defendants' decision to use the age of 55 as a hypothetical retirement age is rationally related to its goal of decreasing costs. The PERS classification does not violate the Equal Protection Clause. Accordingly, plaintiff's equal protection claim is dismissed with prejudice.

B. Eighth Amendment Claim

Defendants correctly note that claims of Eighth Amendment "cruel and unusual punishment" generally do not survive outside the criminal context. See Ingraham v.

Wright, 430 U.S. 651, 667-68, 97 S. Ct. 1401, 1410, 51 L. Ed. 2d 711 (1977) ("In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable.") Plaintiff has asked this Court to dismiss his Eighth Amendment claim without prejudice "lest a dismissal with prejudice later be interpreted as a ruling on the facts when pled pursuant to other theories and other Claims for Relief." This hardly seems likely, and accordingly plaintiff's Eighth Amendment claim is dismissed with prejudice.

C. Section 1983 Retaliation Claim

Plaintiff alleges that defendants ignored his request for an appeal in response to his references to age discrimination in his request, an act which he claims was deliberate retaliation for exercise of his first amendment rights. He also alleges that defendants made public a reputation-damaging medical report in order to punish plaintiff for exercising his right to petition the government for redress and engaging in off-duty union activity.

Deliberate retaliation by state actors against an individual's exercise of the First Amendment is actionable under section 1983. See Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989); Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir. 1986). To make out a prima facie claim of retaliation, the plaintiff has the burden of showing that retaliation for the exercise of protected conduct was the "substantial" or motivating factor behind the defendants' conduct. See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471 (1977). Because subjective intent is an element of the clearly established First Amendment law, plaintiff must put forward nonconclusory allegations of subjective motivation, supported either by direct or circumstantial evidence. In his complaint, plaintiff merely makes conclusory allegations that the defendants acted in

response to his reference to age discrimination. The only evidence that plaintiff has to support his claim is that the alleged retaliatory events happened. As a result, his 1983 retaliation claim does not survive defendants' motion to dismiss. Because there is a possibility that plaintiff may be able to obtain some substantive support of section 1983 retaliation, the Court dismisses this claim with leave to amend, but plaintiff should only refile if he can find evidence that is legally sufficient to support such a claim.

D. Procedural due process

Plaintiff claims that his Fourteenth Amendment due process rights were violated because defendants denied his request for an appeal of the decision to set his retirement allowance at 27 percent of his full compensation, and he was never given an explanation of the decision. In other words, plaintiff argues that defendants did not afford him due process before determining the amount of his disability benefits. He contends that if he had had a predetermination hearing or had been granted an appeal, he could have notified PERS that it had made errors in deciding that his disability was the result of a condition, rather than an injury (and therefore qualifying for the violent act or hazardous duties exceptions to section 21417) and in using a 2.5 percent, rather than a 2 percent multiplier.[4] Furthermore,

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[4] Plaintiff contends that PERS erroneously calculated his disability benefits by multiplying his years of service by only 2 percent, omitting the additional statutory multiplier of 1.25. He also believes that his disability allowance may have been decreased to 27 percent because PERS does not consider the time between injury and retirement a time of potential service for the purposes of calculating the allowance. Since plaintiff was injured in 1990 and the retirement decision was not made until several years later, plaintiff received less than 15 years of credit for potential service. Thus, his disability allowance was much lower than it could have been. It is not clear from the pleadings which alleged error--the use of the 2 percent multiplier or the noncredit for the years between

plaintiff alleges that defendant Nishioka made public a 1991 medical report that found plaintiff to be "clinically depressed" and asserted that the report was the basis of plaintiff's disability retirement. Plaintiff says he was not given any notice that the report would be made public nor was he given an opportunity to respond to it, and that Nishioka's actions have cost him future employment in his chosen profession. Plaintiff does not appear to be making a due process challenge to defendants' decision to retire him involuntarily, so the cases plaintiff cites regarding public employees who were discharged without due process are inapposite. The only due process issues this Court will address are whether plaintiff was entitled to due process in the calculation of his disability benefits and in Nishioka's decision to make public plaintiff's medical report.

A threshold requirement to a procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution. In order to have a property interest in a benefit, a person must demonstrate that he or she has a legitimate claim of entitlement to it, not merely a unilateral expectation. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538, 105 S. Ct. 1487, 1491, 84 L. Ed. 2d 494 (1985). While the Constitution protects property rights, the source of property interests is not the Constitution. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law." Id. (quoting Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972)).

1. Property Interest in Increased Disability Benefits

The Ninth Circuit has held that the complete deprivation of pension or disability benefits amounts to the deprivation of constitutionally protected property. See

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injury and retirement--is the reason his disability retirement was calculated to be about 27% of his final compensation.

Raditch v. United States, 929 F.2d 478, 480 (9th Cir. 1991) (federal disability payments); Gonzalez v. Sullivan, 914 F.2d 1197 (9th Cir. 1990) (federal disability payments) Knudson v. Ellensburg, 832 F.2d 1142, 1144-45 (9th Cir. 1987) (municipal disability payments); Ostlund v. Bobb, 825 F.2d 1371, 1373 (9th Cir. 1987) ("Unquestionably, the claimant had a property interest in his disability retirement benefits."). In these cases, however, plaintiffs were completely deprived of pension or disability benefits, while in the present case, plaintiff has only been deprived of a percentage of those benefits. Whether a partial deprivation of disability benefits is a property interest is another question altogether. In this case, defendants have already determined that he is entitled to disability benefits; the only question is how much he should receive. The property at stake here amount to less than 30 percent of the pension that allegedly is owed to plaintiff. The Second Circuit has found that a mere decrease in benefits, as opposed to a complete deprivation, is not a federal constitutional claim; rather it is a contract dispute that should be adjudicated in state court. See Costello v. Town of Fairfield, 811 F.2d 782, 784 (2nd Cir. 1987) ("Clearly, it is the interpretation of a contract term that is at issue here and the appellants have pursued this contract dispute in the district court under the guise of a due process violation."). While this Court is not completely persuaded by the Second Circuit argument, the Court does find that since plaintiff is already receiving most of the benefits he seeks, the property interest here is significantly less compelling than that of an individual who has been denied the very means by which to live. Less is due to plaintiff than to employees who were fully deprived of benefits. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Matthews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972)).

Determining what process is due requires consideration of three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state's interest in the function involved and in lessening the fiscal or administrative burdens that the alternative procedures would impose. See Matthews, 424 U.S. at 335, 96 S. Ct. at 903.

The Court finds that the redress procedures available to plaintiff for a loss of a portion of his benefits are sufficient to satisfy due process. According to Cal. Gov't Code § 20134, the PERS Board of Administration may, at its discretion, hold a hearing for the purpose of resolving any questions arising from the benefits program. The hearings are conducted before an administrative law judge, in accordance with Cal. Gov't Code § 11500 et seq. See Cal. Gov't Code § 20134. If the employee making the administrative appeal does not agree with the outcome of the hearing, she [sic] may petition for a writ of administrative mandate against the Board in a state superior court. The Court rejects plaintiff's contention that a partial loss of benefits requires a predeprivation hearing. "While this interest may, in some cases, be significant, disability claimants do not necessarily live on 'the very margin of subsistence.' Unlike welfare assistance, disability benefits are not related to financial need." Sauceda, 917 F.2d at 1219 (quoting Matthews, 424 U.S. at 340, 96 S. Ct. at 905.). Also, a prior evidentiary hearing will offer very little value in terms of preventing erroneous decisions. The disability retirement decisions are predominantly determined by a strict statutory formula and medical reports. "These decisions will generally be reliable because they are made on the basis of objective written documentation." Id.; cf. Mathews, [sic] 424 U.S. at 343-45, 96 S. Ct. at 907-08 (finding a decision about disability based on objective medical reports is a more focused and easily documented decision than the determination of welfare

entitlement). Finally, a claim to a predeprivation hearing "as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." Matthews, 424 U.S. at 331, 96 S. Ct. at 900. In this case, the property at issue is simply an amount of benefits; plaintiff will receive full compensation if he succeeds with his administrative appeal or at the superior court level.

As of now, however, defendants have only been willing to give plaintiff a hearing on the age discrimination claim; he has yet to be heard on the 27 percent issue. Accordingly, the Court orders defendants to give plaintiff a hearing on the 27 percent issue in compliance with Cal. Gov't Code § 20134. If plaintiff disagrees with the outcome of that hearing, he should proceed to a state superior court for redress. If these procedures are followed, the Court finds no due process violation.

2. Liberty Interest in Freedom to Work and Earn a Living

Plaintiff alleges that his due process rights were also violated when Nishioka made public a reputation-damaging medical report about plaintiff and asserted that the report was the basis for plaintiff's disability retirement, without giving plaintiff notice of or an opportunity to respond to the allegations.

The liberty interest protected by the due process clause "encompasses an individual's freedom to work and earn a living." Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093, 1100 (9th Cir. 1981). "[W]hen the government dismisses an individual for reasons that might seriously damage his standing in the community, he is entitled to notice and a hearing to clear his name." Id. "To implicate constitutional liberty interests, however, the reasons for dismissal must be sufficiently serious to 'stigmatize' or otherwise burden the individual so that he is not able to take advantage of other employment opportunities." Id. at 1101. However, only "charges that

carry the stigma of moral turpitude" such as dishonesty or immorality may implicate a liberty interest, while charges of incompetence or inability to get along with others--whether or not they are true--do not. Wheaton v. Webb-Petett, 931 F.2d 613, 617 (9th Cir. 1991); Portman v. Santa Clara, 995 F.2d 898, 907-08 (9th Cir. 1993). Also, "allegations that exclude a person permanently from a profession" may also infringe a constitutionally protected liberty interest, even if they do not rise to the level of moral turpitude. Roley v. Pierce County Fire Protection Dist. No. 4, 869 F.2d 491, 496 (9th Cir. 1989).

In this case, whether or not it is true, a medical report about clinical depression does not amount to charges of dishonesty or moral turpitude. Plaintiff makes conclusory statements that the medical report will permanently exclude him from his chosen profession, but has no evidence that it will do so. The mere fact that the charges may be unfair or untrue does not give rise to a constitutional claim: "The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." Bishop v. Wood, 426 U.S. 341, 350, 96 S. Ct. 2074, 2080, 48 L. Ed. 2d 684 (1976). Accordingly, plaintiff was not entitled to due process on this claim, and the Court dismisses it with prejudice. The absence of a constitutional element to this claim, however, does not in any way affect plaintiff's ability to make a similar claim, based on state defamation laws, in state court.

E. Section 1983 Claims

Section 1983 imposes liability upon any person who, acting under the color of state law, deprives another of a federally protected right. 42 U.S.C. S 1983. To state a claim under section 1983, a complaint must allege that the defendant deprived plaintiff of a right secured by the Constitution or laws of the United States and that such deprivation was committed by persons acting under color of state law. See West v. Atkins, 487 U.S. 42, 48, 108 S. Ct.

2250, 2254-55, 101 L. Ed. 2d 40 (1988); see also Ketchum v. Alameda County, 811 F.2d 1243, 1245 (9th Cir. 1987). Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. See Graham v. Connor, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 1870, 104 L. Ed. 2d 443 (1989). Thus, if plaintiff's ADEA claims are dismissed, he cannot state a separate claim for relief predicated on those claims under section 1983. See Southeastern Community College v. Davis, 442 U.S. 397, 404 n.5, 99 S. Ct. 2361, 2366 n.5 (noting that if plaintiff cannot prove underlying statutory violation, court does not have to decide section 1983 claim). Plaintiff therefore has no separate 1983 claims predicated on ADEA violations or any federal constitutional violations.

III. State Law Claims

This Court has dismissed all of plaintiff's federal claims. Hence, plaintiff's remaining claims—that he is entitled to and was denied an administrative appeal under Cal. Gov't Code § 3304(b); violations of California State Constitution Art. I §§ 1, 7, 13, 15; and defamation—are dismissed without prejudice for adjudication in state court. See 28 U.S.C. § 1367(c)(3).

IV. Plaintiff's Motion For Costs and Fees of Service

On August 6, 1998, plaintiff filed a motion for the costs and fees of formal service from the State of California. Plaintiff contends he is entitled to costs of service because the State of California refused to waive formal service and agree to service by mail, citing Fed. R. Civ. P. 4(d)(2)'s statement that the defendant "has a duty to avoid unnecessary costs of serving the summons." He contends that when he attempted to serve process by mail on the state through the state attorney general, pursuant to Cal. Gov't Code § 955.4, the action was routed to Leslie Lopez, state deputy attorney general and counsel for defendants. Lopez told plaintiff that neither she nor the attorney general was

authorized to accept service for the state, and plaintiff alleges that she did not respond to his requests for an explanation. Plaintiff then abandoned mail service and had the action formally served on the Attorney General's office on July 13, 1998, before the expiration of the 120-day time limit for service of process mandated under Fed. R. Civ. P. 4(m). Defendants contend that Cal. Gov't Code § 955.4 applies only to claims arising under the Tort Claims Act, and thus, plaintiff's service on the attorney general could not accept process for the state. However, according to the California Code of Civil Procedure:

> (a) A summons may be served on a public entity by delivering a copy of the summons and of the complaint to the clerk, secretary, president, presiding officer, or other head of its governing body.
>
> (b) As used in this section, "public entity" includes the state . . .

Cal. C. Civ. Pro. § 416.50. Defendants have not explained why the attorney general's office should not have accepted process for the state under this statute, or whom plaintiff should have served. Accordingly, costs and fees of formal service are awarded to plaintiff subject to the State of California explaining why the attorney general should not accept process for the state.

CONCLUSION

For the above stated reasons, defendants' motion to dismiss is GRANTED as to all of plaintiff's federal claims. Plaintiff's claims that defendants violated the ADEA, as well as his equal protection, Eighth Amendment, and due process rights, are dismissed with prejudice. His claim of section 1983 retaliation is dismissed with leave to amend, and his motion for costs and fees of formal service is GRANTED.

IT IS SO ORDERED.

DATED: September 3, 1998 (SIGNED)
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

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APPENDIX D

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GENE KAPLAN

Plaintiff *Pro Se*,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEMS (PERS), et al.,

Defendants

/

No. C 98-1246-CRB

ORDER AND ENTRY OF JUDGMENT

FILED JAN 28, 1999
ENTERED IN CIVIL DOCKET 2/1/99

On September 3, 1998, this Court dismissed all counts contained in plaintiff's complaint in the above-captioned matter. All but one were dismissed with prejudice; only plaintiff's claim under 28 U.S.C. § 1983 for retaliation in response to his exercise of First Amendment rights was dismissed with leave to amend.

Plaintiff has now advised the Court that he does not intend to file an amended complaint with respect to this claim. Therefore, the case is hereby DISMISSED, WITH PREJUDICE, and judgment is entered in favor of defendants. Each party shall bear its own costs.

IT IS SO ORDERED.

Dated: 1-27-99

(SIGNED)
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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APPENDIX E

APPENDIX E

U.S. Constitution Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution Amendment 11:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Constitution Amendment 14:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Government Code §3303 provides in relevant part:

For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.
(West's Annotated California Codes, Government Code Sections 940 to 3999, 1995.)

California Government Code §3304:

(a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with

any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure.

Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him with insubordination.

(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal.

(West's Annotated California Codes, Government Code Sections 940 to 3999, 1995.)

California Government Code §3304 revised and in force since 1998 provides in relevant part:

(a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure.

Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him or her with insubordination.

(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal.

[NOTE: In 1997 the Legislature substituted "charge him or her"" for "charge him" in subd. (a) and in 1998 the exclusion for probationary employees was added.]

(West's Annotated California Codes, Government Code

Sections 940 to 3999, Cumulative Pocket Part, 2000.)

California Government Code §11500, Definitions effective July 1, 1978 through June 30, 1997 provided in relevant part:

In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions, and officers enumerated in Section 11501 and those to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency, and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

(b) "Party" includes the agency, the respondent, and any person, other than an officer or an employee of the agency in his or her official capacity, who has been allowed to appear or participate in the proceeding.

(c) "Respondent" means any person against whom an accusation is filed pursuant to Section 11503 or against whom a statement of issues is filed pursuant to Section 11504.

(d) "Administrative law judge" means an individual qualified under Section 11502.

(e) "Agency member" means any person who is a member of any agency to which this chapter is applicable and includes any person who himself or herself constitutes an agency.

(f) "Adjudicatory hearing" means a state agency hearing which involves the personal or property rights of an individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual. However, the procedures governing such a hearing shall include, but not be limited to, all of the following:

(1) Testimony under oath.

(2) The right to cross-examination and to confront adversary witnesses.

(3) The right to representation.

(4) The issuance of a formal decision.

(West's Annotated California Codes, Government Code Sections 9400 to 12299, 1992.)

California Government Code §11501, Application of chapter; enumeration of agencies:

(a) This chapter applies to any agency as determined by the statutes relating to that agency.

(b) The enumerated agencies referred to in Section 11500 are:

[There follows a listing of State agencies; PERS is listed between]:

Pharmacy, California State Board of

Public Employees' Retirement System, Board of Administration of the

Real Estate, Department of

(West's Annotated California Codes, Government Code Sections 9400 through 12999, 1992.)

California Government Code §11505(a) effective 1979 through June 30, 1997 provides in relevant part:

(a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon him of the accusation, and that failure to do so will constitute a waiver of his right to a hearing, and (2) copies of Section 11507.5, 11507.6, and 11507.7.

(West's Annotated California Codes, Government Code Sections 9400 through 12999, 1992.)

California Government Code §11505(c) effective 1991 through June 30, 1997 provides in relevant part:

(c) The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions.
(West's Annotated California Codes, Government Code Sections 9400 through 12999, 1992.)

California Government Code §11505(a) revised and effective July 1, 1997 provides in relevant part:

(a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon * * * the respondent of the accusation, and that failure to do so will constitute a waiver of * * * the respondent's right to a hearing, and (2) copies of Section 11507.5, 11507.6, and 11507.7.
(West's Annotated California Codes, Government Code Sections 9400 to 12299, Cumulative Pocket Part, 2000.)

California Government Code §11505(c) revised and operative July 1, 1997 provides in relevant part:

(c) The accusation and all accompanying information may be sent to the respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil action. Service by registered mail shall be effective if a statute or agency rule requires the respondent to file *** the respondent's address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to the respondent at the latest address on file with the agency.

(West's Annotated California Codes, Government Code Sections 9400 to 12299, Cumulative Pocket Part, 2000.)

California Government Code §11506, Notice of defense; grounds; right to hearing effective 1986 through June 30, 1997 provides:

(a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense in which he may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another

regulation enacted by another department affecting substantive rights.

(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

(c) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow any particular form.

(d) Respondent may file a statement by way of mitigation even if he does not file a notice of defense.

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

(West's Annotated California Codes, Government Code Sections 9400 to 12299, 1992.)

California Government Code §11506, Notice of defense; grounds; right to hearing revised and operative July 1, 1997 provides:

(a) Within 15 days after service *** of the accusation the respondent may file with the agency a notice of defense in which *** the respondent may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that *** the respondent cannot identify the transaction or prepare a defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

(b) Within the time specified respondent may file one or more notices of defense upon any or all of these grounds but all *** of these notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(c) The respondent shall be entitled to a hearing on the merits if ***the respondent files a notice of defense, and ***the notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file a notice of defense shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

(d) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state ***the respondent's mailing address. It need not be verified or follow any particular form.

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

(West's Annotated California Codes, Government Code Sections 9400 to 12299, Cumulative Pocket Part, 2000.)

California Government Code §21132, State Safety Member:

Every state safety member shall be retired on the first day of the calendar month succeeding that in which he or she attains age 65. Every member who has attained age 65 when he or she becomes a state safety member shall be retired on the first day of the following month.

(West's Annotated California Codes, Government Code

Sections 20600 to 22999, Supplementary Pamphlet, 2000.)

California Government Code §21292.5, State safety member; industrial disability effective April 1, 1973 through 1995 provided:

Upon retirement of a state safety member for industrial disability he shall receive a disability retirement allowance of 50 percent of his final compensation plus an annuity purchased with his accumulated additional contributions, if any, or, if qualified for service retirement, he shall receive his service retirement allowance if such allowance, after deducting such annuity, is greater.

(West's Annotated California Codes, Government Code Sections 20600 to 22999, 1995.)

California Government Code §21292.6, Member after Jan. 1, 1980; industrial disability; amount of allowance effective January 1, 1980 through 1995 provided in relevant part:

Notwithstanding any other provision of this part, the industrial disability retirement allowance of a member whose membership commenced after January 1, 1980, in the category of membership in which the member was serving at the time of suffering the disability or incurring the disease causing retirement for industrial disability, shall not exceed the service retirement allowance that would be payable as a result of service in that category of membership if the member's service had continued to age 55, if a patrol, state peace officer/firefighter member, state safety, or local safety member ...

This section shall not be applicable to a member who is subject to Section 21307, or a member whose disability results from an injury which is a direct consequence of a violent act perpetrated upon his or her person or occurs during the performance of those portions of his or her duties which are particularly hazardous and dangerous.

(West's Annotated California Codes, Government Code

Sections 20600 to 22999, 1995.)

California Government Code §21407, State police officer/firefighter member or local safety member; industrial disability which replaced §21292.5 effective January 1, 1996 provides:

Upon retirement of a state peace officer/firefighter member or a local safety member subject to Section 21363 or 21363.1 for industrial disability, the member shall receive a disability allowance of 50 percent of his or her final compensation plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, the member shall receive his or her service retirement allowance if the allowance, after deducting the annuity, is greater.

(West's Annotated California Codes, Government Code Sections 20600 to 22999, Supplementary Pamphlet, 2000.)

California Government Code §21417, Member after Jan. 1, 1980; industrial disability; amount of allowance which replaced §21292.6 effective January 1, 1996 provides:

Notwithstanding any other provision of this part, the industrial disability retirement allowance of a member whose membership commenced after January 1, 1980, in the category of membership in which the member was serving at the time of suffering the disability or incurring the disease causing retirement for industrial disability, shall not exceed the service retirement allowance that would be payable as a result of service in that category of membership if the member's service had continued to age 55, if a patrol, state peace officer/firefighter, state safety, or local safety member...

This section shall not be applicable to a member who is subject to Section 21430, or a member whose disability results from an injury that is a direct consequence of a violent act perpetrated upon his or her person or occurs during the performance of those portions of his or her duties that are

particularly hazardous and dangerous.

California Government Code §21430, Local safety member; allowance based upon percentage of permanent disability; election by agency added by Stats. 1995 provides:

Upon retirement of a local safety member for industrial disability, the member shall receive in lieu of the allowance otherwise provided by this article a disability retirement allowance in the amount of the percentage of final compensation equal to the percentage of permanent disability determined by the Workers' Compensation Appeals Board for the purposes of permanent disability payments pursuant to Article 3 (commencing with Section 4650) of Chapter 2 of Part 2 of the Labor Code with respect solely to the injury resulting in the disability requirement and giving effect to Section 4750 of the Labor Code, but not less than 50 percent nor in excess of 90 percent of the member's final compensation.

This section shall not apply to any contracting to any contracting agency nor to the employees of any contracting agency unless and until the agency elects to be subject to the provision of this section by amendment to its contract made in the manner prescribed for approval of contracts, or in the case of contracts made after June 14, 1975, by express provision in such contract making the contracting agency subject to the provisions of this section.

This section shall only apply to member who retire for disability on and after the date the agency elects to be subject to this section.

(West's Annotated California Codes, Government Code Sections 20600 to 22999, Supplementary Pamphlet, 2000.)

Title 2, California Code of Regulations, §555.3, Accusation:

Any member whose retirement for disability has been requested by his employer shall be entitled to a hearing. The Executive Officer, upon determination that a member shall be

retired for disability on such application, shall file an accusation and serve a copy thereof on the member and his employer.

(Barclay's Official California Code of Regulations, Title 2. Administration, Vol. 2, revised April 1, 1990)